



Docket No. COLC-2021-0005
Notice of Inquiry on Publishers' Protections Study

Submitted: November 26, 2021

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The Internet Archive submits these comments in response to the United States Copyright Office's October 12, 2021 Notice of Inquiry on a Publishers' Protections Study.

Our comments proceed in two parts. *First*, we provide background information on our organization and aspects of its relation to, and interest in, this study.¹ *Second*, we explain why we oppose new rights and interventions of this sort.²

I. Background on the Internet Archive

The Internet Archive is a 501(c)(3) non-profit library. We are based in San Francisco, California, but most of our patrons visit us online at archive.org. Like other libraries, we work to expand access to knowledge by collecting, archiving, and providing public access to a variety of physical and digital collections.

The Internet Archive's most well-known collection is the Wayback Machine. Beginning in the 1990's and continuing to this day, the Wayback Machine is creating an archive of the world wide web. Like other archival collections, with the Wayback Machine we both *preserve* an important piece of cultural heritage (in this case, the web itself) and provide *access* to it for our patrons.³ Like all libraries, these twin goals—preservation and access—underlie much of what we do.⁴

In order to preserve and provide access to materials in a digital environment—especially for the world wide web, which is organized around hypertext links—it is often necessary both to archive links created by others and to archive the linked source.⁵ The Wayback Machine does both, including for the works of journalists, commentators, and press publishers. These same individuals and institutions—journalists, commentators, and press publishers—are some of the most avid users of the Wayback Machine. They frequently use and cite to the Wayback Machine,

¹ This part responds to inquiry 2(f) of the notice on the effectiveness of current protections.

² This part responds to inquiries 4(a) on the desirability and scope of additional protections and inquiry 2 on the interactions with existing laws and rights.

³ See, e.g., <https://www.loc.gov/rr/useofcollections.html> (describing the goals of access and preservation in relation to the collections of the Library of Congress).

⁴ See <https://archive.org/about/> (describing Internet Archive's collections).

⁵ The provision of links via hypertext being, of course, a foundation of the world wide web. See, e.g., <https://www.internethalloffame.org/inductees/tags/world-wide-web>.

whether to fact check,⁶ shine a light on attempted changes to the historical record,⁷ or simply to find old copies of their work.⁸ Indeed, the Wayback Machine is used so frequently by this group that we quickly found examples of the three preceding types from the past few weeks alone.

One reason that the Wayback Machine has become so useful, not only for journalists but for library patrons of all sorts, is the twin phenomena of link rot (when a linked-to webpage is removed) and content drift (when a linked-to webpage's content subsequently changes).⁹ Because of link rot and content drift, documents containing links—whether reports on the news of the day, government publications from Supreme Court decisions¹⁰ to this very notice of inquiry, or documents of any other sort—become incomplete or unintelligible if the linked-to material is not contemporaneously preserved.¹¹ The Wayback Machine has therefore become an important and in many cases unique archival resource for a web constructed around linking.¹²

II. There Should Be No Exclusive Right to Link

We agree that the changed economic circumstances of journalism, and journalism's role in a free democratic society, are important issues—but they neither support nor necessitate the changes under study here. These changes represent, in effect, a new exclusive right to link—whether achieved through the introduction of an explicit new right, collective action, or mandatory arbitration.¹³ Creating such a right would be a terrible mistake; it is not required to achieve the stated economic objectives, and would strike at the heart of fundamental freedoms online.

To begin with, the creation of a linking right is not required to achieve the stated economic objectives. Authors and press publishers whose works would be impacted by this new right already control, through technology and law, the relevant economic circumstances. Existing technology allows the copyright owner to choose whether to first publish their work only to paying subscribers, whether to commercialize it through personalized or other forms of advertising, or whether to make it available for free. And after this initial choice, copyright defines the circumstances in which further uses are made, giving due consideration to the economic interests of the copyright holder. Importantly, copyright has also long protected as fundamental a user's rights in the old equivalent of linking: citation and quotation.

⁶ <https://factcheck.afp.com/http%253A%252F%252Fdoc.afp.com%252F9QU648-1>

⁷ <https://www.foxnews.com/media/politico-jack-shafer-washington-post-steele-dossier>

⁸ <https://www.usatoday.com/story/tech/columnist/2021/10/29/internet-archive-25-take-wayback-machine-back-1996/6196494001/>; *see also* <https://freedom.press/news/archiving-alternative-press-threatened-wealthy-buyers/> (describing a collection intended to preserve the work of writers and journalists whose publishers were facing a change of ownership—including, in particular, where the new owners had a vested interest in changing or removing their work.)

⁹ *See, e.g.*, <https://www.theatlantic.com/technology/archive/2021/06/the-internet-is-a-collective-hallucination/619320>

¹⁰ <https://www.nytimes.com/2013/09/24/us/politics/in-supreme-court-opinions-clicks-that-lead-nowhere.html>

¹¹ *See generally id.*

¹² *See id.*

¹³ <https://www.publicknowledge.org/press-release/public-knowledge-joins-5-consumer-groups-urging-congress-to-amend-jcpa-or-risk-losing-internet-links/>

In many ways, these two issues—the initial choice of how to publish, and the subsequent rights of users—are closely connected. United States copyright law has long focused on the “threshold decision by the author whether and in what form to release his work” as an important axis around which the user's right to cite and quote turns. *See Harper & Row Publishers v. Nation Enterprises*, 471 U.S. 539, 553 (1985). That is because the citation and quotation of published works implicates the broader rights of the public and the interests of society at large. *See id.* at 580. Indeed, these are the affirmative rights of citizens—not just a limitation or exception, but expressly *excluded* from protection by the requirements of authorship and subject matter and the First Amendment. *See id.* at 580 n.2. The imposition of a link tax would therefore interfere not only with fair use and longstanding practice, but with these fundamental user's rights.

Finally, we join the chorus of academics,¹⁴ NGOs¹⁵, and experts¹⁶ around the world that have warned of the "massive collateral damage to access to information, freedom of expression, and business innovation" that a link tax would entail.¹⁷ As they have explained, such an exclusive right would disrupt our information ecosystem and the free and open internet. In the circumstances, we appreciate that the notice of inquiry appears to acknowledge the potential for wide-ranging impact—identifying nearly a full page of questions on a wide range of topics—and urge careful consideration of each.¹⁸

Respectfully submitted,

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¹⁴ <https://www.michaelgeist.ca/2020/06/pay-to-link-canadian-heritage-minister-guilbeault-backs-bringing-the-link-tax-to-canada/>

¹⁵ https://openmedia.org/files/documents/acforpresspublishers_kreutzerengweb-3.pdf

¹⁶ <https://juliareda.eu/eu-copyright-reform/extra-copyright-for-news-sites/>

¹⁷ <https://www.communia-association.org/2016/05/12/ancillary-copyright-publishers-right-link-tax-bad-idea-name/>

¹⁸ Noticeably absent, in our view, were inquiries closer to the Office's ordinary activities—such as the potential impact on libraries and library functions and the challenges in creating an accompanying system of registration. Establishing a registration and deposit system that provides fair and timely notice of all impacted links and webpages would appear to be both necessary and a significant logistical challenge—for all the reasons that apply to actual copyright rights.